UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DIVERSICARE MANAGEMENT SERVICES CO.,
STERLING HEALTH CARE MANAGEMENT CO.
AND CARTER HEALTH CARE CENTERS, INC.
JOINT EMPLOYERS

and

DISTRICT 1199, THE HEALTH CARE AND
SERVICE UNION, SEIU, AFL–CIO

Cases 9–CA–33080-1,-3,-4
9–CA–33096-1
9–CA–33106-1,-2
9–CA–33171-1,-2,-3,-4
9–CA–33494
9–CA–33560
9–CA–33679
9–CA–34172–2
9–CA–34400
9–CA–34497

Engrid Emersen Vaughan, Esq., of Cincinnati, OH, for the General Counsel.
Timothy P. Reilly, Esq. (Taft, Stettinius & Hollister), of Cincinnati, OH, for the Respondent.
Michael J. Hunter, Esq. (Hunter, Smith, Carnahan & Shoub), of Columbus, OH, for the Charging Party.

DECISION AND ORDER APPROVING
INFORMAL SETTLEMENT AGREEMENT

Statement of the Case; Background; Facts

ROBERT M. SCHWARZBART, Administrative Law Judge: The hearing in the above–captioned consolidated matters opened on October 30, 1996, in Grayson, Kentucky, at which time it was continued to a date certain[1] to enable the parties to acquire information necessary to facilitate further settlement discussions.

Thereafter, on August 22, 1997, following continuances variously granted pursuant to unopposed motions for same from Counsel for the General Counsel and the Respondent,[2]

[1] Cases 9–CA–34172–2, 9–CA–34400 and 9–CA–34497 were consolidated herein at various times after the October 30, 1996, adjournment of the hearing in response to subsequent unopposed Motions submitted by Counsel for the General Counsel.

[2] The docket entries since the start of the hearing are as follows: By Order, dated November 26, 1996, I granted the Joint Motion by the General Counsel and Respondent for continuation of the hearing from December 2, 1996, the original date for resumption, to January 13, 1997. My January 3, 1997, Order granted the General Counsel's unopposed Motion that the hearing be continued indefinitely pending completion of the investigation of a new charge against this Respondent in Case 9–CA–34400. That Motion advised that the General Counsel already had determined to seek to consolidate subsequently–arising allegations in Case 9–CA–

Continued

Counsel for the General Counsel has moved that an Informal Settlement Agreement, executed on August 21 and 22, respectively, by Counsel for the Respondent and by herself, be approved. The Union's Memorandum in Opposition to Approval of the Settlement Agreement, filed in response to my Order to Show Cause, as supplemented, and the General Counsel's Response to the Union's Opposition, have been carefully considered.

The consolidated complaints herein, as subsequently augmented, collectively allege 15 independent violations of Section 8(a)(1) of the National Labor Relations Act, as amended, herein the Act; four counts of Section 8(a)(3) and (1) of the Act, including discharges and failure/refusal to reinstate employees alleged as unfair labor practice strikers in the period from August 10 to September 9, 1995; and 20 allegations of refusals to bargain in asserted violation of Section 8(a)(5) and (1) of the Act. All unlawful conduct charged herein was stated to have occurred solely at the Respondent's Carter Health Care Centers, Inc., facility in Grayson, Kentucky, and not at any of that Employer's other locations. Since the issue addressed here relates to whether a Settlement Agreement should be approved and not the merits of these complaint allegations, no useful purpose would be served to detail the asserted violations of the Act. The above summary of the numbers of alleged violations consolidated herein indicates that the only alternative to settlement would be a lengthy, complex trial.

In her Motion for Approval of Settlement Agreement, the General Counsel represented that the "Respondent has agreed therein to pay to its employees 75% of the backpay which would be due if the case were won, and to post a Notice to its employees which addresses the allegations of the outstanding complaints. Although the Charging Party has not agreed to this settlement, it is recommended that said Agreement substantially remedies the alleged unfair labor practices . . . and its approval would effectuate the purposes of the Act."

The Settlement Agreement does not contain a nonadmissions clause, language to the effect that the Respondent, by entering into this Settlement, does not admit having violated the Act.

34172–2 with this proceeding and then was investigating to determine the applicability of also moving to include Case 9–CA–34400. By Order, dated February 10, 1997, I granted the General Counsel's unopposed Motion to consolidate herein the two aforesaid cases and restored the thus–expanded consolidated proceeding to the active trial calendar for May 19. The Respondent's unopposed May 2 Motion to continue this proceeding again to facilitate settlement was granted by Order of May 5, which rescheduled the hearing to August 4. My August 1 Order granted a Joint Motion from the General Counsel and Respondent to continue the hearing indefinitely to enable those parties to put into final form the already–agreed terms of a Settlement Accord. On August 22, Counsel for the General Counsel submitted and moved for the approval of an Informal Settlement Agreement signed by herself and Counsel for the Respondent. This Motion noted that the Settlement had not been signed by the Union. My August 25 Order to Show Cause why the Settlement Agreement should not be approved, which also granted the General Counsel's prior unopposed Motion that the subsequently–issued complaint in Case 9–CA–34497 be consolidated with this proceeding, was supplemented and corrected on September 11. The Union and the General Counsel, respectively, prior to the final return date of September 30, submitted timely Memoranda in Opposition to Approval of the Settlement and in Response to the Union's Opposition.

A. *The Parties' Contentions*

The Counsel for the Charging Union, in his Opposition, urges that the Settlement Agreement, be rejected on the following four grounds, each of which the General Counsel addressed in her Response:

> *1. "The Charged Party has a history of illegal conduct and there appears to be a strong likelihood of repetition of same violations, leaving this matter inappropriate for informal settlement."*

The *Charging Union*, in support of this position, stated that, in addition to the consolidated complaints involving the Respondent's Grayson, Kentucky, facility, its only location involved in the present proceeding, the same Regional Office as here also had issued two other consolidated complaints against this Respondent. These complaints allege divers unlawful conduct by the Respondent at its respective facilities in Ashland and Wurtland, Kentucky. The events alleged in the complaint involving the Respondent's Ashland facility occurred within the same general time frame as the present matter and assert certain of the same types of violations. The Respondent argued that the Respondent had "dragged out the process (in the Ashland case) until the day of the hearing, whereupon it settled all of the charges."

The Union further maintains, on the basis of the more recent complaint alleging Respondent's violations of the Act at its Wurtland facility during 1997, "that the Employer, in the case at hand (because of such subsequent conduct), has no intention of ceasing its illegal, antiunion activities." That party asserts that "(a)ll of the activities described above took place concurrently with the (E)mployer 'negotiating' with the General Counsel regarding resolution of the case at hand." The Union argues that the Respondent "is not about to cease its illegal antiunion activities as a result of entering into this settlement agreement" under consideration for approval. "Rather, by continually delaying this process and by only seeking to settle these matters when all avenues of delay have been exhausted, the Employer as a practical matter achieves its illegal purpose in subverting the statutory protected right to organize. It avoids a finding, pursuant to adjudicatory hearing, that it has violated the law."

In its Opposition, the Union did not state whether it had joined in the settlement of the Ashland case. Although the Union, in its filed Opposition, is critical of the various continuances granted herein, it had not objected to any of them while they were under consideration.

The *General Counsel*, in her Response to the Opposition, agreed that the Region has issued other complaints against the Respondent, but represents that she is unaware of any Board Orders which have issued against any of the Respondents herein. No such Board Orders were cited by the Union.

> *2. "The proposed informal settlement does not provide a 'make whole' remedy to the Charging Party for the Charged Party's illegal efforts to enjoin unlawful picketing in that it does not provide for the reimbursement of attorney fees to the union."*

Here, *the Union* argues that, because the Respondent previously had brought action in a United States District Court seeking to enjoin it from "peacefully picketing during nighttime hours at the facility," which suit was alleged in the present matter as violative of the Act, the remedy provided in the proposed Settlement Agreement is inadequate. This contested part of the proposed settlement remedy provides that the Notice to Employees, to be posted by the Respondent, contain language whereby the Respondent "will not seek to enjoin employees from engaging in lawful picketing. . . " Instead, citing the Board's decision in *Bill Johnson's Restaurants, Inc.,*[3] the Union contends that, under an appropriate remedy, the Respondent also should be required to reimburse the Union for all attorney fees and other expenses that it had incurred in defending against the Respondent's assertedly unlawful lawsuit, such expenses having been incurred solely because the Respondent had instituted its lawsuit. The Union contends that, in *Bill Johnson's Restaurants, Inc., supra,* as here, the court action combined counts and counterclaims for which no violation of the Act was involved, along with claims for which violation of the Act had been found. As the Board's General Counsel has determined that "the analytical framework announced in *Bill Johnson's Restaurants* should also apply to suits filed in federal court," the fact that the lawsuit before the U. S. District Court included matters which were not alleged as violative in the General Counsel's complaints, should not be more of an impediment to an award of attorney fees here than in *Bill Johnson's Restaurants.* Therefore, the Union argues, a Settlement Agreement which does not provide that it be reimbursed for attorney fees would not effectuate the purposes of the Act.

While no copy of any District Court decision in the relevant matter was submitted by the parties, the General Counsel represented in her Response to the Opposition that the Union previously had advised, during the investigation of these cases (prior to issuance of complaint), that the U. S. District Judge who had heard the above complaint initially had included the requested prohibition of all picketing in a temporary restraining order. However, his subsequent preliminary injunction had restored the Union's right to picket peacefully during evening hours.

The *General Counsel* noted inferentially, referring to the length of the complaint in that proceeding, that the Respondent had sought relief in the District Court not only under an alleged secondary boycott in asserted violation of the Taft–Hartley Act, but also under the Racketeer Influenced and Corruption Organizations Act (RICO), the Norris–LaGuardia Act and both the Sherman and Clayton Acts. Accordingly, the General Counsel, while sharing the Union's view that the Respondent's Court action to ban all picketing during certain hours had restrained the employees' rights under the Act, also observes from the numerous complaint allegations before the Court that the Union's counsel had been obliged to defend in the District Court action against a variety of legal theories, almost all of which were unrelated to the Act. Since the time and efforts of the Union's attorney were directed towards the whole complaint, it therefore would be difficult to assign a separate and/or specific defense cost covering only a single paragraph in the prayer for relief made to the District Court.

[3] 290 NLRB 29, 32 (1988), issued pursuant to remand from the U.S. Supreme Court, 461 U.S. 731 (1983).

3. "*The proposal to provide a backpay remedy at 75 percent of moneys due the employees in question is inadequate in the case at hand."*

Contending that a Settlement Agreement should not be adopted which does not make the employees completely whole, *the Union* argues that "(g)iven the history of the Employer . . . and the strength of the underlying allegations, . . . a backpay award alleged to amount to seventy five per cent of the backpay allegedly due to employees is inadequate in this situation."

The *General Counsel*, in her Response, points out that "(t)his compromise figure was reached after lengthy negotiations during which the cost and time of extensive litigation among many other considerations were considered."

4. "*The proposed settlement agreement does not contain a backpay stipulation for employee Gloria Enix."*

The Union argues that the proposed Settlement Agreement is further rendered inadequate in that it does not contain a backpay award for employee Gloria Enix.

To this, the *General Counsel* responds that , while Enix initially had been listed as a backpay recipient in a draft of the Settlement Agreement, Counsel for the General Counsel had been contacted by Union representatives while the Settlement was being finalized. These representatives had raised questions about the possible supervisory status of several individuals, including Enix. The General Counsel represented that this inquiry was relayed to the Respondent's Counsel who confirmed that Enix had been a Respondent's supervisor since August 1995 and, accordingly, had not been in the bargaining unit during the time periods at issue.

B. *Discussion and Conclusions*

In *Independent Stave Company, Inc.,*[4] the Board noted its long ''policy of encouraging the peaceful, nonlitigious resolution of disputes . . .'' observing that ''Congress was aware that settlements constitute the 'life blood' of the administrative process, especially in labor relations.'' As cited in *International Woodworkers of America, Local 3–433, AFL-CIO (Kimtruss Corporation)*,[5] and *National Telephone Services, Inc.,*[6] the Board, in *Independent Stave*, established four criteria for determining whether to approve settlement agreements where one party has objected to the arrangement. Although *Independent Stave* dealt with a private, non-Board settlement which the Board approved over the General Counsel's objections, *International Woodworkers* and *National Telephone Services* noted that those standards also were applicable to Board Informal Settlement Agreements, such as is involved here. The Board held in *Independent Stave* that before approving a purported settlement, it would examine the following four factors: (1) whether the parties have agreed to be bound and what position the General Counsel has taken in regard to the settlement; (2) whether the settlement

[4] 287 NLRB 740, 741 (1987).
[5] 304 NLRB 1, 2 (1991).
[6] 301 NLRB 1, 4 (1991).

is reasonable in light of the allegations of the complaint against the risks inherent in litigation; (3) whether there has been any fraud, coercion or duress by any party in reaching the settlement; and (4) whether the Respondent has a history of violations or has breached past settlement agreements.

From the above principles, I do not find the Charging Union's first argument in its Opposition, that informal settlement is inappropriate because the Respondent has a history of illegal conduct with a likelihood that the same violations will be repeated, to be substantiated.

The Union argues that, besides the present case, the same Board Regional Office as is involved here, Region 9, had issued two complaints alleging Respondent's unlawful conduct at two other of its facilities — respectively at Ashland and Wurtland, Kentucky. According to the Union, the case concerning the Ashland operation was settled on the day of the hearing.

Counsel for the General Counsel has represented that she is unaware of any Board Orders issued against any of the Respondents herein and has expressly stated that approval of the Settlement Agreement would effectuate the purposes of the Act. As the first of the above factors in *Independent Stave* indicates, in determining whether to approve settlement, the General Counsel's position is a significant consideration.

In addition, as Administrative Law Judge Kennedy held in his Board-approved decision in *National Telephone Services*,[7] using language that is applicable here, "[t]he only previous time Respondent has been before the Board, it signed a settlement agreement . . . Whatever the underlying merits may have been, I am unable to consider that case as evidence that Respondent had ever violated the Act. Certainly, neither the instant charges, nor the unresolved charges pending . . . can be used to support the claim there made in opposition (that the Respondent was a chronic wrongdoer)."[8] Here, as in *National Telephone Services*, in the absence of any Board Orders finding the Respondent in violation of the Act, I do not find that the settlement of the case involving the Respondent's Ashland facility and the pending unresolved matter concerning its Wurtland operation to be impediments to approving settlement. At this stage, it would be inappropriate in reaching a determination herein to presume the merits of the remaining complaint. Accordingly, the Respondent's asserted history under the Act, for reasons stated, does not provide a basis for rejecting the proposed Settlement Agreement.

The Charging Union's reliance upon the Board's post–remand decision in *Bill Johnson's Restaurants, supra,* to support the second argument in its Opposition, that the settlement agreement should not be approved because it does not provide the Union with remedial make–whole attorney fees and other expenses incurred while defending against the Respondent's allegedly unlawful suit in a United States District Court, is misplaced. *Bill Johnson's Restaurants* is distinguishable from the present matter in that, unlike here where the issue concerns the approval of a proposed settlement of a Board case when no evidence has

[7] *Ibid.* at 4.

[8] Parenthesized material supplied from the applicable language of *National Telephone Services*.

yet been presented, the Board there had awarded attorney fees and expenses as part of its resultant Order only after settlement of the Board case did not occur and there had been litigation and adjudication.

In *Bill Johnson's Restaurants*, the Respondent had brought an action in an Arizona State Court alleging, *inter alia,* that the Charging Individual, who previously had been discharged for union activities, and others had interfered with its business and threatened public safety by engaging in mass picketing at its premises. On the line, the pickets distributed leaflets assertedly libeling the Respondent. The Board complaints alleged not only the unlawful discharge, but also that the State Court suit had been filed in retaliation for the employees' protected, concerted activities and because the Charging Party had filed an unfair labor practice charge with the Board's Regional Office. Ruling on the parties' cross–motions for summary judgment, the State Court granted the defendants' (Charging Party's) motion for summary judgment on the business interference claims but left the libel claim for trial. Subsequently, the U. S. Supreme Court, concerned that the First Amendment right of access to the courts not be unduly compromised, vacated the Court of Appeals, Ninth Circuit, decision enforcing the Board's Order. In its opinion, the Supreme Court, holding that the Board may not enjoin a well–grounded lawsuit regardless of employer motivation in filing it, established principles to govern the Board when confronted with an allegation that the filing and prosecution of a lawsuit violates the Act.[9] In remanding the matter to the Board for reconsideration consistent with its opinion, the Supreme Court noted that, if the Board thereafter should find a violation, it could order the employer to reimburse the employees for their attorney fees and other expenses.

After the Supreme Court's opinion, the parties to the State Court lawsuit entered into a settlement of that matter which dismissed all remaining claims and counterclaims, with prejudice. In relevant part, under the settlement agreement, each party agreed to pay its own costs and expenses, "provided, however, that Bill Johnson's Restaurants, Inc., shall pay the reasonable attorney's fees and costs incurred by the defendants in the subject lawsuit, not to exceed the total sum of $8,000.00, as previously required by the NLRB, if and to the extent approved by the Supreme Court of the United States. . . ." That settlement, by its terms, did not settle the case before the Board. Accordingly, when the Board, following remand, found that the Respondent in *Bill Johnson's Restaurants* had violated the Act by filing and prosecuting the business interference claims, citing the Supreme Court's opinion, it ordered "the Respondent to reimburse the employees for all attorneys' fees and other expenses that they had incurred in defending the wrongful business interference suit." Consistent therewith, it is relevant to note that the Respondent, in settling the court case, specifically also had agreed to pay the employees' attorney fees and costs which they had incurred in the lawsuit.

As noted, unlike *Bill Johnson's Restaurants* where the court case had settled but the concurrent case before the Board had proceeded through the litigation/adjudicative process to Board Order, the present issue is whether to approve the settlement of this proceeding prior to a determination of its merits. While the District Court's subsequent ruling which, as

[9] These principles, which are summarized at 290 NLRB, *supra,* at 30, are not relevant to the determination herein.

represented by the General Counsel, permitted peaceful picketing during evening hours, could provide the Union with some encouragement and, possibly, a claim for costs in the District Court about which I make no finding, this was not tantamount to a meritorious determination in the present case. Recognizing that settlement entails compromise,[10] the decision in *Bill Johnson's Restaurants* contains no language mandating that a case against a Respondent alleged in a charge or complaint to have filed an unlawful court lawsuit against a Charging Party cannot be settled without necessarily granting the Charging Party attorney fees and expenses related to the court proceeding. This is particularly germane where there has been no Board determination of illegal conduct and the risks and difficulties inherent in litigation, which will be considered below, remain to be addressed.[11] The Board's Order In *Bill Johnson's Restaurants* issued only after the parties to that proceeding, through the litigation process, had already moved beyond those obstacles.

The Union's third argument in its Opposition, that the Settlement Agreement, which provides for backpay at 75 percent of alleged entitlement and posting of a remedial notice, is inadequate because it does not make the employees completely whole was addressed by the Board in *Independent Stave,*[12] as follows:

> At this stage of the litigation, we are confronted only with *alleged* violations of the Act. Even though the allegations in the complaint issued after the Region's investigation and determination that reasonable cause exists to believe the allegations occurred, a charging party's right to a remedy can be enforced, upon the authority of the Government, only after an adjudication. In addition, there are risks inherent in litigation. For example, witnesses may be unavailable or uncooperative; procedural delays may occur; the issues may be complex or novel; supporting documentation may have been destroyed or lost; and credibility resolutions may have to be made by the administrative law judge. By operating on a rigid requirement that settlement must mirror a full remedy, we would be ignoring the realities of litigation.[14]

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[14] *Hotel Holiday Inn v. NLRB*, 723 F.2d 169, 172–173 (1st Cir. 1983). All of the uncertainties of an adversary hearing, *i.e.* the competence of counsel, the thoroughness of preparation, the memories of witnesses, the attitudes of the hearing officer, and the availability of witnesses, stood between [the employees] and [a full remedy].

The Board in *Independent Stave* found it reasonable, in the circumstances of that case, to approve a private, non–Board settlement which did not provide for the posting of a remedial notice and which provided for a backpay award which the General Counsel, in opposing, estimated at a significantly smaller percentage of total potential entitlement than is proposed here. The present settlement is a detailed Informal Board Agreement, carefully negotiated over

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[10] See *Independent Stave Company, Inc.,* 287 NLRB, *supra,* at 743.

[11] Contrary to the General Counsel, the Union argues with force that, under *Bill Johnson's Restaurants*, the fact that the District Court lawsuit also included matters which the complaint herein did not allege as violative of the Act might not prevent an award of attorney fees. However, that case does not guide this situation for the reasons set forth above.

[12] 287 NLRB, *supra,* at 742–743.

an extended period, which affords backpay at 75 percent of maximum entitlement and provides for the posting of a three-page remedial notice which, as the General Counsel represented, "addresses the allegations of the complaints." Noting, too, that the complaint allegations herein are only alleged violations; the potentially lengthy hearing which would be required in this case; the aforesaid risks of litigation, including the large number of prospective witnesses and the complexity of the evidence; the systemic avenues for appeal before the Board and the courts, which could materially delay implementation of any remedies; and, at the end of that process, the always-present possibility of similarly appealable supplemental backpay proceedings, I find, consistent with the above second *Independent Stave* principle, that the proposed settlement provides reasonable remedy in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation.

Finally, contrary to the Union's fourth argument in its Opposition, that the Settlement Agreement should not be approved because it does not provide a backpay remedy for Gloria Enix, I accept the General Counsel's representation that she had removed Enix' name from the list of backpay claimants in an earlier settlement draft only after Union representatives had challenged Enix' entitlement to same on the ground that she had been a supervisor during all times relevant herein and, therefore, had been outside the bargaining unit and the protection of the Act. Accordingly, the General Counsel did not seek backpay for Enix upon information provided by the Union in accordance with its position at the time concerning her status.

The General Counsel's assertion in this regard is supported by the terms of the proposed Settlement Agreement, a comprehensive document which lists backpay awards in various amounts to 283 named employees. The sums involved run from the largest reimbursement of nearly $8,700.00 for one individual to more intermediate amounts for some to nominal payments for others. As represented, whatever the amounts, it is undisputed that the specified backpay represents 75 percent of maximum entitlement, less any interim earnings. From this concentrated effort affecting so many employees, it does not appear that the General Counsel would have excluded Gloria Enix from the backpay computation had she not had valid reason, as presented, for so doing. Accordingly, I conclude that the absence of a backpay award for Enix does not provide basis for not approving the proposed settlement.

Noting that, in this case, the Respondent, having signed the Settlement Agreement, is bound by its terms within the meaning of *Independent Stave*; that the General Counsel has presented the Settlement for approval and has argued for its adoption; that the settlement has been found above to be reasonable with respect to the allegations of the complaint and the risks inherent in litigation; that no contention has been made that the Settlement Agreement, in any way, was fraudulent or was reached through coercion or duress; and that, as concluded above, the Respondent has no history of previously-adjudicated violations of the Act, or of having breached past settlement agreements, under the factors set forth in *Independent Stave*, there are no persuasive reasons why the proposed Settlement Agreement should not be approved.

Therefore, I issue the following recommended[13]

ORDER

[13]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

It hereby is ORDERED, upon the General Counsel's Motion, that the proposed Informal Settlement Agreement be, and the same hereby is, approved.[14]

Dated, Washington, D.C. November 5, 1997

Robert M. Schwarzbart
Administrative Law Judge

[14] Noting that since the proposed Settlement Agreement, as amended by the August 25, 1997, Order to Show Cause and by the September 11, 1997, Supplemental Order to Show Cause, provides that the specified backpay is to be paid in three equal installments, the first of which was to become due on the no longer feasible date of October 31, 1997, the first backpay installment will not become payable until December 1, 1997. Also, on or before December 1, 1997, the Respondent will pay the entire amounts due to those employees whose backpay is $400.00 or less. The remaining two installment dates set forth in the Agreement, January 1, 1998, and January 31, 1998, will continue as such without change. As noted in my August 1, 1997, Order, the hearing in this matter will continue to be adjourned indefinitely pending compliance with the terms of the Informal Settlement Agreement approved herein.